

HONORABLE JUDGE THOMAS S. ZILLY

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

A.B., by and through his parents, L.B.
and M.B., on his own behalf and on
behalf of similarly situated others; L.B.;
M.B.; C.M. and A.H., on behalf of their
minor child J.M., and on behalf of
similarly situated others; C.M.; and
A.H.,

Plaintiffs,

vs.

PREMERA BLUE CROSS,

Defendant.

Case No. 2:23-cv-00953-TSZ

**DEFENDANT PREMERA BLUE CROSS'
REPLY BRIEF ON STANDING AND
MOOTNESS**

**NOTE ON MOTION CALENDAR:
SEPTEMBER 13, 2024**

Pursuant to this Court's Minute Order, Dkt. 63, Premera submits this reply brief addressing the issues of standing and mootness raised in the August 15, 2024 hearing before this Court.

I. Standing and mootness are distinct doctrines.

Premera agrees that standing and mootness are distinct, yet related, doctrines. Under Article III of the Constitution, the plaintiff must have a sufficient "personal stake in the lawsuit . . . to make out a concrete 'case' or 'controversy'" to which federal judicial power may extend. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000) (citation omitted), *as amended* (Aug. 11, 2000). As the U.S. Supreme Court explained in *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), the "requisite personal interest that must exist at the commencement of the litigation (standing) must

1 continue throughout its existence (mootness).” *Id.* at 189. So even if a case or controversy exists
 2 at the outset, the case may become moot “when the issues presented are no longer ‘live’ or the
 3 parties lack a legally cognizable interest in the outcome.” *Wolfson v. Brammer*, 616 F.3d 1045,
 4 1053 (9th Cir. 2010). This is because “[a] case or controversy must exist at all stages of review,
 5 not just at the time the action is filed.” *Id.*

6 Named Plaintiff A.B. has never had standing to seek injunctive relief because A.B. had
 7 the surgery in question on the same day that A.B. and his parents initiated this action. Named
 8 Plaintiff J.M. had standing to seek injunctive relief at the time the lawsuit was filed, but it is
 9 undisputed that J.M.’s individual claims for injunctive relief will become moot when J.M. turns
 10 18 in late 2024.

11 **II. The mootness doctrine applies differently in the class action context.**

12 Premera acknowledges there is authority in the Ninth Circuit supporting the idea that if
 13 the class is certified before the named plaintiff’s individual claims become moot, the named
 14 plaintiff can still seek relief on behalf of the class if certain requirements are met. *See Johnson*
 15 *v. City of Grants Pass*, 72 F.4th 868, 884 (9th Cir. 2023), *rev’d and remanded on other grounds*,
 16 144 S. Ct. 2202 (2024). Those requirements include that (1) the class must be properly certified,
 17 or the class representative must be appealing the denial of class certification; (2) the class
 18 representative is a member of the class *and* had standing to sue at the time class certification was
 19 granted or denied; (3) the unnamed class members still have a live interest in the relief sought;
 20 and (4) the named representative will adequately pursue the interests of the class even though his
 21 or her own interest has expired. *Id.* at 884 & n.18.

22 If the class is not certified before the class representative’s claims become moot, then the
 23 class claims are also moot unless an exception—such as the “inherently transitory” exception—
 24 applies.

1 **III. The “inherently transitory” exception to the mootness doctrine does not apply here.**

2 The U.S. Supreme Court has recognized a limited exception to the mootness doctrine in
 3 the class action context that applies only when “[s]ome claims are so inherently transitory that
 4 the trial court will not have even enough time to rule on a motion for class certification before
 5 the proposed representative’s individual interest expires.” *County of Riverside v. McLaughlin*,
 6 500 U.S. 44, 52 (1991) (citation omitted). The “inherently transitory” exception does not apply
 7 here for two separate reasons: (1) based on J.M.’s age, it is and has always been certain that
 8 J.M.’s claim would become moot in late 2024; (2) other class members are young enough that
 9 the Court would have sufficient time to rule on class certification before their claims become
 10 moot.

11 **A. Plaintiffs forfeited any reliance on the inherently transitory doctrine by**
 12 **engaging in unreasonable delay.**

13 Courts routinely refuse to apply the exception when the named plaintiff knew, from the
 14 outset, exactly how long his or her claim would remain alive but chose to wait to file for class
 15 certification until the claim was nearly moot or already moot. *Gawry v. Countrywide Home*
 16 *Loans, Inc.*, 395 F. App’x 152, 159 (6th Cir. 2010). That is precisely what Plaintiffs did here.

17 In *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992), the plaintiff knew from the outset that
 18 his claim alleging violations of the Sherman Act based an NCAA eligibility policy would become
 19 moot within 120 days based on the start date of his NCAA football season, but he chose to wait
 20 112 days before filing his complaint seeking injunctive relief. *Id.* at 1086. The Seventh Circuit
 21 relied on this filing delay to find that *Banks* could not benefit from the “inherently transitory”
 22 exception to the mootness doctrine. *See id.* (“Had Banks been diligent in filing his claim shortly
 23 after discovering that he had failed to be selected for the draft or as a free agent, and still been
 24 unable to obtain class certification, he might have been able to make an argument for the class
 25 that he had standing for the purpose of pursuing a ruling on class certification even though his
 26 own individual claim had become moot.”).

27 Likewise, in *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir. 1984), the Seventh Circuit refused

1 to apply the inherently transitory doctrine because the named plaintiff had a live claim for seventy
2 days but never filed for class certification during that brief time period.

3 In *O'Quinn v. Fries*, No. 1:13-cv-14, 2014 WL 309178 (N.D. Ind. Jan. 27, 2014), the
4 court found that the plaintiff failed to qualify under the “inherently transitory” exception because
5 he failed to file his motion for class certification until more than six months after the complained-
6 of activity. *Id.* at *4; *see also Davis v. Astrue*, No. CV 12-0388 WPL/KBM, 2012 WL 12882370,
7 at *5 (D.N.M. Dec. 17, 2012) (refusing to apply inherently transitory exception when the plaintiff
8 knew of the forthcoming mootness for at least four months but failed to timely move for class
9 certification).

10 Here, as in *Gawry*, *Banks*, *Trotter*, *O'Quinn*, and *Davis*, the “inherently transitory”
11 exception does not apply because Plaintiffs have always known precisely when J.M.’s injunctive
12 relief claims would become moot: on the day of J.M.’s eighteenth birthday in late 2024. And
13 Plaintiffs knew about J.M.’s claims over a year before J.M. turned 18. Plaintiffs could have
14 immediately sought a preliminary injunction or otherwise asked for expedited class certification
15 proceedings. Yet Plaintiffs waited over seven months to add J.M. as a named plaintiff, never
16 sought any emergency relief, did not oppose a discovery schedule that lasted well beyond J.M.’s
17 eighteenth birthday at the time it was entered by the Court, and waited over eight months after
18 learning of J.M.’s putative claim before moving for class certification. Plaintiffs forfeited any
19 reliance on the inherently transitory doctrine by engaging in unreasonable delay, which created
20 the risk of mootness that need not have existed.

21 **B. The inherently transitory exception does not apply because it is certain that**
22 **other class members will remain in the class long enough to certify the class.**

23 To fall within the inherently transitory exception, the class claims must also be truly
24 transitory: it must be “uncertain that a claim will remain live for any individual who could be
25 named as a plaintiff long enough for a court to certify the class.” *Olson v. Brown*, 594 F.3d 577,
26 582 (7th Cir. 2010) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). In *Olson*, for
27 example, the court found that it was uncertain “that any potential named plaintiff in the class of

1 inmates would have a live claim long enough for a district court to certify a class” because “the
 2 length of incarceration in a county jail generally cannot be determined at the outset and is subject
 3 to a number of unpredictable factors.” *Id.*; *see also* *Gawry*, 395 F. App’x at 158-59 (“[T]he crux
 4 of the inherently transitory exception is ‘the uncertainty about the length of time a claim will
 5 remain alive.’”).

6 The opposite is true here. As is the case with named plaintiff J.M., the birth dates of the
 7 absent class members are certain. In the putative class of 35 members, there is one class member
 8 who is currently fifteen years old and four class members who are currently sixteen years old.
 9 Payton Decl. ¶ 3, Ex. A. There is no question that this Court would have sufficient time to
 10 determine the merits of the claims of these absent class members before they turn eighteen. *See*
 11 *Fund for Animals, Inc. v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005) (“As a general rule, two
 12 years is enough time for a dispute to be litigated.”); *Gawry*, 395 F. App’x at 159. Because the
 13 claims of these members are not inherently transitory, the exception does not apply here.

14 Even though the inherently transitory exception does not apply in this case, this Court has
 15 set a briefing schedule which contemplates issuing a ruling on class certification before J.M.
 16 turns 18, which would render the exception inapplicable in any event.

17 **IV. J.M.’s parents will not be adequate class representatives after J.M. reaches the age**
 18 **of 18.**

19 After J.M. reaches the age of 18 and his claims for injunctive relief become moot, the
 20 claims of J.M.’s parents will likewise be moot. Both standing and mootness look to “the
 21 plaintiff’s *personal* stake in the lawsuit is sufficient to make out a concrete ‘case’ or
 22 ‘controversy’” to which federal judicial power may extend. *Pershing Park Villas Homeowners*,
 23 219 F.3d at 899 (emphasis added).

24 Premera is not currently aware of any authority supporting the idea that J.M.’s parents
 25 could remain adequate class representatives after J.M. reaches the age of 18. Moreover, J.M.’s
 26 parents sued only “on behalf of their minor child J.M.” Dkt. 34, at 1. The amended complaint
 27 fails to allege that J.M.’s parents have any personal stake in this litigation outside of the coverage

1 claims of their minor child J.M.¹ J.M.'s parents are over the age of 18, and there is no evidence
 2 in the record or allegations in the operative complaint that J.M.'s parents have another minor
 3 child seeking coverage from Premera for top surgery to treat gender dysphoria or otherwise meet
 4 the class definition. The only reason J.M.'s parents are named Plaintiffs is that J.M. is currently
 5 a minor and a dependent of a plan administered by Premera for which J.M.'s parent is a member.
 6 Indeed, once J.M. is over 18, his parents no longer have standing to litigate on his behalf, even if
 7 he had standing. *See Diamond v. Charles*, 476 U.S. 54, 67 (1986).

8 Because J.M. can no longer be harmed by the complained-of provision in Premera's
 9 medical policy once J.M. turns 18, based on the class definition and the manner in which
 10 Plaintiffs have framed their complaint, J.M.'s parents also can no longer be harmed either.
 11 Accordingly, there is no case or controversy with respect to J.M.'s parents because their claims
 12 will become moot for the same reason that J.M.'s claims will become moot.

13
 14 Dated this 13th day of September, 2024.

15 KILPATRICK TOWNSEND & STOCKTON LLP

16 By /s/ Gwendolyn C. Payton
 17 Gwendolyn C. Payton, WSBA No. 26752
 18 gpayton@ktslaw.com
 19 1420 Fifth Ave., Suite 3700
 20 Seattle, WA 98101
 21 Telephone: (206) 626-7714
 22 Facsimile: (206) 623-6793

23
 24 *Counsel for Premera Blue Cross*

25 ¹ The amended complaint baldly alleges that "J.M. . . . and his parents . . . are being discriminated
 26 against on the basis of sex" and "are also being discriminated against on the basis of age." Dkt.
 27 34 ¶ 5. But the amended complaint contains no *factual allegations* plausibly alleging that
 Premera made any decisions, or otherwise discriminated, based on the sex or age of *J.M.'s*
parents. Legal conclusions styled as factual allegations should be disregarded. *Ashcroft v. Iqbal*,
 556 U.S. 662, 678 (2009).

CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, DEFENDANT PREMERA BLUE CROSS' REPLY BRIEF ON STANDING AND MOOTNESS to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

Eleanor Hamburger Daniel S. Gross SIRIANNI YOUTZ SPOONEMORE HAMBURGER 3101 WESTERN AVENUE STE 350 SEATTLE, WA 98121 206-223-0303 Fax: 206-223-0246 Email: ehamburger@sylaw.com dgross@sylaw.com	<input checked="" type="checkbox"/> by CM/ECF <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Omar Gonzalez-Pagan LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC 120 WALL STREET 19TH FLOOR NEW YORK, NY 10005 646-307-7406 Email: ogonzalez-pagan@lambdalegal.org	<input checked="" type="checkbox"/> by CM/ECF <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
J. Denise Diskin Q LAW FOUNDATION OF WASHINGTON 400 EAST PINE STREET STE 225 SEATTLE, WA 98122 206-483-2725 Email: denise@qlawfoundation.org	<input checked="" type="checkbox"/> by CM/ECF <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery

DATED this 13th day of September, 2024.

KILPATRICK TOWNSEND & STOCKTON
LLP

By: /s/ Gwendolyn C. Payton
Gwendolyn C. Payton, WSBA #26752

Counsel for Premera Blue Cross